

REMARKS

Claims 1, 2, 4-6 8-13 and 15-20 were pending in the application, new claims 21-23 are added.

Claims 1, 2, 4-6 8-13 and 15-20 have been rejected.

Claims 1, 2, 4-6, 8-13 and 15-23 remain pending in this application.

The subject matter of cancelled claims 3, 7, and 14, which was previously moved to the independent claims in response to the Examiner's withdrawn indication of allowability, is removed from the independent claims and restored to new dependent claims 21-23.

The independent claims are amended to include a feature described, *e.g.*, on page 31 of the specification as filed.

Reconsideration of the claims is respectfully requested.

CLAIM REJECTION UNDER 35 U.S.C. § 101

Claims 18-20 were rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter. This rejection is respectfully traversed.

The Examiner's rejection is without basis, and the Examiner does not cite any authority. The Examiner notes that “functional descriptive material” may be claimed as a statutory product when embodied on a tangible computer readable medium”. Claims 18-20 are drawn to a multiplexed program stream recorded to a storage disk associated with a digital video recorder – as this material is “recorded to a storage disk”, it is clearly “embodied on a tangible computer readable medium.”

The multiplexed program stream, its structure, and its function, is clearly described in the specification, and it is clearly “functional descriptive material.” This is a product within the meaning of 35 U.S.C. § 101, and should be treated as a statutory product claim in accordance with MPEP 2106.01.

Accordingly, the Applicant respectfully requests the Examiner to withdraw the double patenting rejection.

CLAIM REJECTION UNDER 35 U.S.C. § 103

Claims 1, 2, 4-6, 8-13 and 15-20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Publication No. 2005/0265700 to *Kato*, hereinafter “*Kato*” in view of U.S. Patent No. 5,565,923 to *Zdepski*, hereinafter “*Zdepski*”. The Applicant respectfully traverses the rejection.

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a *prima facie* case of obviousness. (*In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). See also *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984)). It is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. (*Id.* at 1073, 5 USPQ2d at 1598). In so doing, the examiner is expected to make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), *viz.*, (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; and (3) the level of ordinary skill in the art. In addition to these

factual determinations, the examiner must also provide “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” (*In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir 2006) (cited with approval in *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007)).

Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. MPEP § 2142, p. 2100-125 (8th ed. rev. 5, August 2006). To establish a *prima facie* case of obviousness, three basic criteria must be met: *Id.* First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. *Id.* Second, there must be a reasonable expectation of success. *Id.* Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *Id.* The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant’s disclosure. *Id.*

The independent claims are amended to specify that the fixed-size packet header includes an indication of a time when the packet was processed, as described in the specification. This is not taught or suggested by any art of record, alone or in combination, and so all rejections are moot and are traversed.

Accordingly, the Applicant respectfully requests the Examiner to withdraw the § 103 rejection with respect to these claims.

CONCLUSION

As a result of the foregoing, the Applicant asserts that the remaining claims in the Application are in condition for allowance, and respectfully requests that this Application be passed to issue.

If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at wmunck@munckcarter.com.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

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